# THE PLEDGE-IDEA: A STUDY IN COMPARATIVE LEGAL IDEAS. III.

## 8. Greek Law.[1]

THE terms of Greek law are important as throwing light on the terms of the later Roman law. The generic term for a pledge, with or without pledgee's possession, was ὑποθήκη. That this was generic, and was not restricted to pledgor's possession, is abundantly testified;[2] though in post-classical times, the practical condition was, on account of the extensive use of a registry-system, much like that of our own, — i. e. realty was usually left in the pledgor's possession, while personalty was not, so that the Romans of the later Empire found ὑποθήκη applied customarily to realty and to pledgor's possession.[3] The classical term for the specific case of pledgee's possession was ἐνέχυρον,[4] though this in later usage, correlatively, would be chiefly applicable to personalty.

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[1] The Greeks were not a lawyer-nation, in the way in which the Romans and the English were; they did not have the *elegantia juris*, the taste for legal principle as such, even in the degree in which the Jews and the Japanese had it; they possessed merely a body of customary law, such as other civilized peoples have developed. The material comes to us chiefly through the great orators and a few inscriptions; the fragments of only one law-book (Theophrastus) survive, and that is only an attempt to make a collection of the various customs.

References: 1869, Telfy, Corpus Juris Attici; Köhler, Corpus Inscriptionum Atticarum, II, No. 4, and Supplement of 1896; 1895, Dareste, Houssoulier, and Reinach, Recueil des Inscriptions Juridiques Grècques; 1663, Salmasius (Saumaise), De Modo Usurarum; 1825, Platner, Der Process und die Klagen bei den Attikern; 1867, Dareste, Prêt à la Grosse chez les Athéniens; 1877, Id., Une loi éphésienne du premier siècle avant notre ère, Nouv. rev. hist. du droit fr. et étr., I, 161; 1884, Id., La transcription des ventes en droit hellénique, ib., VIII, 380; 1885, Id., Les inscriptions hypothécaires en Grèce, ib., IX, 1; 1869, Büchsenschütz, Besitz und Erwerb im Griechischen Alterthume; 1870, Hofmann, Beiträge zur Geschichte des Griechischen und Römischen Rechts; 1870, Caillemer, Le contrat de vente à Athènes, Rev. de Législ. fr. et étr., 1870, 647; 1887, Meier u. Schömann, edited by Lipsius, Der attische Process; 1891, Goldschmidt, Universalgesch. d. Handelsrecht; 1891, Fustel de Coulanges, Nouvelles Recherches, Le droit de propriété chez les Grecs; 1893, Guiraud, La propriété foncière en Grèce; 1893, Sieveking, Das Seedarlehen des Alterthums. The important essay by Szanto, Hypothek u. Scheinkauf im Griechischen Rechte, Wiener Studien, 1887, 279, has not been accessible.

[2] Salmasius, cc. XIII, XIV; Platner, 302; Meier & S., 505.

[3] Salmasius, c. XIII, beginning.

[4] References *ante;* though this also was used generically: Harpocration, quoted in Inscr. Jurid. Gr. 124.

The rules of Greek pledge-law now known to us are few. (I.) The compounds of the same verb-stem served to express the ideas of (1) "pledge," (2) "bet with stakes," and (3) "promise."[1] The pledgee apparently had the risk of a deficit or loss;[2] and he clearly had, all through the classical period, no duty to restore the surplus;[3] only towards the Christian era do we see any trace of such a duty.[4] Of the pledgee's defect of title and of his expedients for curing it, by *resignatio*-clause or otherwise. we hear nothing, except for the hypothec. (II.) The hypothec appears simply as a pledge which the pledgor kept until default,[5] and then the pledgee either entered or (if obstructed) brought suit for eviction.[6] What has been said as to deficit and surplus applies equally to the hypothec; except that in the ναυτικὸν δάνεισμα (*fœnus nauticum*, a precursor of bottomry), the risk was certainly on the pledgee.[7] The instances of hypothec are almost always

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[1] (1) τιθέναι, θέσις, as generic: Büchsenschütz, 484; (2) παρακαταθήκη, Platner, 364, ἐπιδιατίθεσθαι, Meier & S., 521, Telfy, No. 1526; (3) συνθήκη, συντίθεσθαι, M. & S., 494. Again, ὑπάλλαγμα was colloquial for ἐνέχυρον: Salmasius, 581; while συνάλλαγμα was an ordinary phrase for contract. Again, Ἔγγυον δάνεισμα, distinguished from ναυτικόν, was a loan secured by realty: Büchsenschütz, 490; and ἐγγυητής was a personal surety: Salmasius, 707; while μεσεγγυᾶν, -ημα, was a bet: Platner, 364; M. & S., 521. In Salmasius, 581 ff., will be found an interesting collation of the Greek, Hebrew, and Latin variants of ἀρραβών, *arrabo*, *arrha* pointing out their primitive sense of "pledge," as well as the surviving one of "earnest"; and this primitive connection of "earnest," "pledge," and "forfeit," as worked out for Germanic law by Franken (§ 4) is undoubtedly full of significance.

[2] Büchsenschütz, 485; Hofmann 115; Platner, 308; all building on a passage in Lysias, Κακόλογ., 10.

[3] F. de Coulanges, 143; Guiraud, 283, 287; Büchsenschütz, 485, 491; Dareste, Une loi éphésienne, 171. Platner, 307, and M. & S., 509, make the opposite statement, but cite no authority. A conclusive fact would seem to be that while the pledgee on default is mentioned as having the right to get possession by entry (ἐμβάτευσις) or action for eviction (δικὴ ἐξούλης), nothing at all is said about paying over any surplus; the above authors probably assume that this was implied, but the implication, as our comparative study indicates, would be just the opposite.

[4] Dareste, ib., where as a war-measure all unsecured loan-claims were declared extinguished, and all pledges were to be apportioned between pledgee and pledgor according to the amount of the original claim.

[5] Dareste's phrase is "un droit suspendu." A phrase (Kohler, No. 1139; Inscr. Jur. No. 62) which is perhaps typical of the thought is: "ὅρος χωρίου καὶ οἰκίας ὑποκειμένων [. . . naming amount], ὥστε ἔχειν καὶ κρατεῖν τὸν θέμενον κατὰ συνθήκας [contract document) παρὰ [deposited with] Δεινίᾳ Εὐωνυμεῖ"; i. e. to become the pledgee's property on the terms described in the document. Dareste misunderstands this parase as implying present possession by the pledgee; but this cannot be, for the ὅρος shows (see *post*) that the pledgor retained possession.

[6] Platner, 263; M. & S., 423, 747; Guiraud, 287; F. de Coulanges, 143.

[7] Büchsenschütz, 486; Sieveking, 19; Goldschmidt, Handelsr., 349; Dareste, Prêt à la

provisions for a future contingent, not a past default, indicating the same notion as in Germanic law.[1] Again, the inability to conceive of a second hypothec on the same *res* at the same time is another mark of the primitive idea.[2] Finally, there is nothing in the mode of transfer of title to indicate that the hypothec did not follow, as in Germany, the normal modes of transfer.[3] (III.) The

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Grosse, 41. A minor evidence, but after all a most significant one, for the forfeit or equivalency idea in the hypothec is the constant use of *ἀποτιμᾶν, ἀποτιμήματα*, said of the things valued; *ἀποτιμήθασθαι, -θέντες* said of the pledgee; *ἀποτιμᾶν*, said of the pledgor: Telfy, Nos. 1518, 1527; Köhler, 1106, 1124; Platner, 263, 281, 302; M. & S., 419, 507. When the husband, lessee, etc., gave a hypothec for a possible default, it was essential that a specific portion of land, etc., should be set apart and "appraised" as the equivalent thus predetermined, i. e. to be accepted, for better or for worse, as the ultimate satisfaction. Now if this appraisal had anything to do with surplus-restoration, it would be found also in the ordinary pledge, but it is found exclusively in the hypothec, and must mean, here as in other laws, that the portion was thus appraised beforehand because it was to be the sole resource of the pledgee on default. This explains the passage of Demosthenes so misunderstood by Platner (305) and others: "*νόμος, ὃς οὐκ ἐᾷ διαρρήδην, εἰς ἃ* [or *ὅσα*] *τις ἀπετίμησεν, εἶναι δίκας; . . . ὃς οὐκ ἐᾷ τῶν ἀποτιμηθέντων* [i. e. pledgees] *ἔτι δίκην εἶναι πρὸς τοὺς ἔχοντας*"; i. e. the pledgee has no further claim over and above the portion thus appraised in advance.

[1] The usual purposes are: a guardian's liability for the minor's property, a husband's liability for the *dos*, a lessee's liability for rent. See examples in Dareste, Les inscriptions, etc.; Köhler, Nos. 1055, 1059; Guiraud, 284; and references in the preceding note.

[2] Büchsenschütz, 491; Dareste, Une loi, etc. (in which the application of the principle is clearly demonstrated); id., Les inscriptions, etc. (where he acutely suggests that the reason the *ὅροι*, or hypothec-stones, bore no date, was that, as only one such lien could exist, the question of priority, and therefore of dates, was immaterial; yet in Inscr. Jurid., at 130, he seems to ignore this original attitude); Telfy, No. 1509 ("*μὴ ἐπιδανείσασθαι ἐπὶ τοῖς αὐτοῖς ἐνεχύροις*"); M. & S., 526. The second lender was thus obliged to pay off the amount of the first loan; and take the title to cover both; we have already seen this process resorted to in Chaldea; Demosthenes describes it as followed in Greece; and it will be found in Rome again.

[3] In many regions there were public registers for the entry of transfers, including hypothecs; Hofmann, 80 ff.; Guiraud, 285–287; sometimes they were publicly cried in the streets: ib.; whether there were such registers at Athens is disputed: Caillemer; Dareste, La transcription, etc. A typical feature at Athens was the *ὅρος*, or boundary-stone (Salmasius, 636; B., 490; Platner, 304; Dareste, Les inscriptions; and preceding references), of pyramid shape, placed in the country at the boundaries, and in the city before the house, and inscribed with the amount and names in case of a hypothec or sale-for-resale. But the hypothec was equally valid though no *ὅρος* was used (Inscr. Jurid., 138; B., 490); and the important thing to notice is that the *ὅρος* had nothing to do with the transfer of title; for it was not used where the pledgee took possession (of the seventy examples in Köhler, all are either of sale-for-resale — where the vendee had probably leased back — or of guardian's or husband's hypothec, or of vendor's lien; No. 1139 has been explained *ante*), and it was used for vendor's lien (Telfy, 1508, note; Dareste, Les inscriptions), as well as for the ordinary hypothec; in short, its purpose was chiefly to prevent the pledgor from erecting his possession by fraud into a title, and, secondarily, to warn subsequent innocent creditors.

sale-for-resale form was very common, and seems usually to have been followed by a lease back to the pledgor.[1] As the duty of surplus-restoration was not recognized, and as there is no trace of any interest-prohibition or usury-rate,[2] the sale-for-resale appears as a form practically interchangeable with the pledge, and the theory of its primitive purpose already advanced seems corroborated. (IV.) There seems to be no indication that the Vifgage transaction (reckoning fruits against capital-debt) had been resorted to in classical times.[3] Negatively this indicates that such a reckoning is merely a stage in the development of the ordinary pledge. The absence equally of any usury-ban, and of any duty of accounting, are concurrent marks of the primitive stage in which we find Greek custom. It is to be noted, in conclusion, that the term "antichresis," which later appears in Roman law, is not found in classical Greek.[4]

## 9. Roman Law.[5]

If the forfeit-idea has never been hitherto applied to explain the development of the present subject in Roman law, it is perhaps partly because much that has been written on the subject

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[1] Büchsenschütz, 491; F. de Coulanges, 141; Guiraud, c. X; examples will be found in Köhler, 1059–1139; Dareste, La transcription, 391; id., Les inscriptions, *passim*. Out of the 50 inscriptions in Köhler, 28 are in the sale-for-resale form, and in those of his Supplement the proportion is about the same; the typical phrase is, "ὅρος χωρίου πεπραμένου ἐπὶ λύσει"; while of the hypothec it is, "ὅρος οἰκίας ἐν προικὶ [dowry] ἀποτιμηθείσης."

[2] Büchsenschütz, 496.

[3] Büchsenschütz, 485, and Guiraud, c. X, assert the contrary, but give no authority.

[4] Χρῆσις was the term for loan (M. & S., 512; Salmasius, 618, 629); and as Salmasius points out, ἀντίχρησις means merely a counter-loan or mutual loan, i. e. land and money loaned in exchange; the bearing of this will be discussed in speaking of the Roman law.

[5] References: 1872, 1884, Krueger v. Mommsen, Corpus Juris Civilis; 1879, Huschke, Jurisprudentia Antejustiniana, 4th ed.; 1887, Bruns, Fontes Juris Romani Antiqui; 1891, Krueger u. Studemund, Collectio Librorum Juris Antejustiniani; 1636, Salmasius, De Modo Usurarum; 1832, Wächter, Wer hat bei Obligationen die Gefahr zu tragen? Arch. f. civil. Praxis, XV, 132; 1846, Rudorff, Ueber die Pfandklagen, Z. f. gesch. Rechtswiss., XIII, 181; 1847, Bachofen, Das Römische Pfandrecht; 1860, Dernburg, Pfandrecht; 1888, Id., Pandekten, 2d ed.; 1870, Degenkolb, Ein Pactum Fiduciæ, Z. f. Rechtsgesch., IX, 117; 1870, Hofmann, Beitr. z. Gesch. d. Griech. u. Röm. Rechts; 1876, Jourdan, L'Hypothèque; 1882, Kohler, Pfandrechtliche Forschungen; 1887, Geib, Actio Fiduciæ und Realvertrag, Z. d. Sav. Stift.; 1888, Voigt, Der Pignus der Römer, Kön. Sächs. Ges. d. Wiss., 1888, XL, 236; 1889, Heck, Die Fiducia cum amico contracta, Z. d. Sav. Stift.; 1891, Cuq, Institutions Juridiques des Romains, L'Ancien Droit; 1891, Biermann, Custodia u. Vis major, Z. f. Sav. Stift.

is open to the criticism once uttered by a German jurist:[1] "These writers," he says, "treat the compilation of Justinian as if it were a modern code, — a manner of treatment which is in fact wholly inapplicable to the *Corpus Juris Civilis;* the writer who is to expound the pure Roman law must never forget that the principles and rules collected in that law-book had their sources throughout a period of more than five hundred years; and he should know that law does not stand still for five hundred years, and that perhaps no system of law ever went forward so rapidly as that of Rome in the first five centuries of our era." It is of course dangerous for one not trained in the Roman system and practised in its application to attempt to reach positive conclusions; but in this instance the evidence is apparently so strong that one may be excused for rehearsing it and pointing out its significance.[2]

But, first, a clear understanding as to the technical terms in Roman law. A commonly accepted notion is that *pignus* is not a generic term at all; that it is limited (1) to movables,[3] and particularly (2) to the pledgee's possession.[4] Both these limitations, it must be said, are without foundation.[5] (1) *Pignus* was applied indiscriminately to movables and immovables, *res mancipi* and *nec mancipi*.[6]

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[1] Biermann, in Z. d. Sav. Stift., 1877, 33.

[2] The Roman lawyers quoted *post* lived at the following approximate dates: A. C. 1–50, Labeo; 50–100, Javolenus; 100–150, Pomponius, Gaius; 150–200, Gaius, Scævola, Papinian; 200–250, Ulpian, Paulus, Marcian, Modestinus. This ends the classical period of Roman law. The Code quotations *post* (with one or two exceptions of about 223 A. C.) are later than these lawyers.

[3] Cuq, 636, *semble;* Dernburg, 46 ("wesentlich"); 1895, Buckler, Contract in Roman Law ("probably"). But this, to be sure, is hardly asserted as matter of law; it is merely regarded as a practical consequence of the limitation next mentioned.

[4] Taking only English works, and those of the last quarter-century, the following treatises illustrate the popularity of this notion: 1870, Mackenzie, Studies in R. L., 3d ed.; Tomkins and Jencken, Modern R. L. ("originally"); 1876, Hunter's R. L.; 1878, Sandars, Institutes of J.; 1884, Morey, Outlines of R. L.; 1886, Whitfield's Salkowski, R. Private L.; 1890, Poste, Gaius, 3d ed.; 1892, Ledlie's Sohm, Institutes of R. L.; 1893, Chamier, Manual of R. L.; 1895, Buckler, Contract in R. L.

[5] Except that the Greek Jurists of Justinian's time used them; but the usage, as we shall see, was late and local.

[6] Innumerable quotations could be given: "insula," D. 41, 2, 36; "fundum," D. 44, 7, 16; "fundum vel hominem," D. 27, 9, 5, § 3; "fundus," D. 45, 1, 85, § 6; "fundus," D. 8, 1, 16; "fundum," D. 13, 7, 18, § 3; "prædia," citations in Dernburg, 34; "agrorum," C. VIII, 16, 2; "domus," D. 20, 1, 29, § 2; "ager," D. 20, 4, 3, § 2; "insula," D. 20, 2, 1. The Latin of the invaders, after the fall of the Empire, was equally indiscriminate: "vinea et terra" (871 A. D.); "terra" (1000's); "villam" (1105), "prado" (748), cited Köhler, 87, 93, 353, 84, and others in the same volume and in

(2) *Pignus* was applied indiscriminately to a pledge retained by the pledgor and to one handed to the pledgee; the distinction being expressed by a different verb employed with *pignus*.[1] In other ways, too, in the classical usage (down to, say, Justinian's time), *pignus* is seen as the generic term for the subject, like *wed* in Germanic usage.[2] Why should this truth ever have been doubted? Because of the misunderstanding of a few misleading passages of the classical jurists, and because the alien usage of Justinian's time did employ *pignus* with the above limitations.[3]

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those cited in the preceding articles. In the face of the numerous instances quoted in his own volume, it is singular that Dernburg can write (46) that *pignus* "blieb dann wesentlich auf bewegliche Sachen beschränkt."

[1] We know this chiefly (1) by finding *pignus* where it unmistakably appears that the pledgor kept possession; (2) by the fact that the Salvian interdict and the Servian and quasi-Servian actions were intended for pledgees desiring to obtain possession, and that *pignus* and *pigneraticia* were used in connection with them. For a few illustrations of (1) see D. 20, 2, 4 and 5; 20, 1, 1; 20, 5, 13; 43, 32, 1, § 5; 47, 2, 61, § 8; C. IV, 65, 5. A perusal of titt. 13 and 20 of the Digest will easily convince; but the exhaustive survey of Voigt, in the essay above referred to, ought to put the matter beyond future question. Cuq (634), Jourdain (90), Rudorff (201), Dernburg (64; but see his Pandekten, 636), and Bachofen (8) accept *pignus* as covering pledgor's possession. A significant bit of evidence, not pointed out by Voigt or Salmasius, is found in the passages in which a problem is put about a *hypotheca* (or, most significantly, a Greek ὑποθήκη), and then the jurist proceeds to discuss it in terms of *pignus* exclusively; e. g. Scævola, in D. 20, 1, 34; Paulus, in D. 20, 3, 4; Gaius, in D. 20, 4, 11, and 20, 6, 7, § 4; Marcian, in D. 20, 1, 13, § 1, and 20, 4, 12, § 9.

[2] For example, in the generic use of *pigneraticia* coupled with *actio;* and in the phrase *jure pignoris* as employed when specifically dealing with a *hypotheca* (e. g. C. VIII, 25, 11, A. C. 532). It is interesting to note that the broadly generic use of *pignus* was fully pointed out in 1636 by Salmasius (cc. XIII, XIV), and that not until Voigt's essay, in 1888, has this doctrine been thoroughly understood and clearly brought out by a modern scholar; Salmasius' demonstration seems to have been wholly overlooked, except by Révillout (Oblig. en droit égypt., 233). Many have agreed that *pignus* in classical times bore the broader meaning; but the important fact is that it was the generic term from the very first.

[3] These passages seem to be only five in number:—

(1) Gaius, in D. 50, 16, 238, § 2: "'Pignus' appellatum a 'pugno' [fist], quia res quæ pignori dantur manu traduntur; unde etiam videri potest verum esse, quod quidam putant, pignus proprie rei mobilis constitui."

(2) Florentinus, in D. 13, 7, 35, § 1: "Pignus, manente proprietate debitoris, solam possessionem transfert ad creditorem; potest tamen precario et pro conducto debitor re sua uti."

(3) Ulpian, in D. 13, 7, 9, § 2: "Proprie pignus dicimus quod ad creditorem transit, hypothecam cum non transit nec possessio ad creditorem."

(4) Isidorus, Orig. V, 25, 22 and 24 (Bruns, 408): "Pignus est, quod propter rem creditam obligatur, cuius rei possessionem solam ad tempus consequitur creditor; ceterum dominium penes debitorem est; . . . hypotheca est, cum res commodatur sine depositione pignoris, pactione vel cautione sola interveniente."

(5) Inst. IV, 6, 7: After pointing out that there is no legal difference with respect

But the legal sources of the latter date are comparatively few; and for the Roman law down to, say, 500 A. D., *pignus* is the generic term with the lawyers and with the people. *Fiducia* is the sale-for-resale form. *Hypotheca* is a word used by the Greek Justinianean jurists for a pledge with pledgor's possession. We

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to the creditor's form of action: "Sed in aliis differentia est; nam pignoris appellatione eam proprie contineri dicimus quæ simul etiam traditur creditori, maxime si mobilis sit; at eam quæ sine traditione nuda conventione tenetur, proprie hypothecæ appellatione contineri dicimus."

As to the first passage, it proves merely that a few persons then thought that *pignus* was "peculiarly" applied to movables, but that the orthodox view was to the contrary. As to the second, it rather proves the present proposition, by asserting that a *pignus* may be valid though remaining in the pledgor's hands *precario*, i. e. the typical hypothec-form of the *pignus*. As to the third (supposing it genuine, which Puchta doubts, Pandekten, 12th ed., 1877, 193, note), it involves no denial that *pignus* can be used generically, but merely an assertion of a distinctive usage; moreover, the very same author is reported as writing (D. 13, 4, 1): "Pignus contrahitur non sola traditione, sed etiam nuda conventione, etsi non traditum est," a proposition not to be mistaken. As to the fourth, the author's date (ob. 636 A. C.) and his presumable use of Justinianean sources, puts it on the same footing as the next. As to the fifth, it may be conceded that it represents the Justinianean (Greek) notion of *pignus*, but that is a very different thing from the classical usage of nearly four centuries before (as will be explained), and proves nothing on that point. On the other hand, and quite apart from the ample proof mentioned in the preceding note, there are equally categoric assertions representing the present contention; (1) the Ulpian passage *supra;* (2) four passages of Paulus: D. 20, 1, 29: "Paulus respondit generalem quidem conventionem sufficere ad obligationem pignorum"; 2, 14, 17: "De pignore jure honorario nascitur ex pacto actio"; 2, 14, 4 ("item quia," etc.); 47, 2, 67, § 1: "Si is qui rem pignori dedit, vendiderit eam; quamvis dominus sit, furtum facit, sive eam tradiderat creditori, sive speciali pactione tantum obligaverat"; (3) C. VIII, 16, 2, A. C. 207: "Cum constet pignus consensu contrahi," etc.; (4) Pomponius, in D. 13, 7, 8, 5: "Cum pignus ex pactione venire potest," etc.; (5) Marcian, in D. 20, 1, 5, § 2: "Inter pignus autem et hypothecam tantum nominis sonus differt," which at least is clear for the present purpose (its further difficulty being explained later). For classical usage, then, these may be taken as completely offsetting the doubtful passage of Ulpian; and the question is at least thrown open to the inductive evidence of the sources themselves, as indicating the actual usage; and on this basis, as above indicated, there can be no doubt. But how is the later and Justinianean usage accounted for? As already pointed out (*ante*, p. 18), ἐνέχυρον in later Greek usage (see the Egyptian papyrus of 359 A. C. in Bruns, 266) *did* apply peculiarly to property held by the pledgee, while ὑποθήκη had become restricted to a *res* kept by the pledgor, i. e. peculiarly, an immovable. Now Justinian and his compilers knew Greek better than they did Latin, and, living across seas in the Byzantine capital, they naturally described the "distinctive" usage to be what they were accustomed to. But it was a usage which, however categorically they assert it for themselves, cannot possibly be made to harmonize with that of the classical jurists whose works they digested (as Voigt, 244, points out), and does not harmonize with the orthodox usage which the Germanic invaders found at Rome and perpetuated in the Latin they there learned. For the Justinianean usage as wholly peculiar, see Voigt, 242 ff.; and for an explanation of how the compilers employed the term *hypotheca*, see Salmasius, cc. XIII, XIV, and *post*, p. 33, in this article.

come now to the development of the pledge-idea, taking up the evidence under the heads already used in the preceding articles.

I. That the same root served originally for the ideas afterwards differentiated as "pledge," "promise," and "bet" or "forfeit," is undoubted,[1] and we may thus assume, *prima facie*, that the starting-point in Roman thought was the same as that of Germanic thought.

A. 1. (*a*) We have no direct evidence of a time when the pledgee was understood to have no personal action against the pledgor; but we have indications that such a principle once prevailed.[2] (*b*) As to the incidence of the risk, we may infer that, so far as bailee's risk was concerned, the classical law was just emerging from the stage in which there had been absolute responsibility;[3] and we can thus

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[1] Παγ- (πήγνυμι) was the root for *pignus:* Curtius, Griech. Eytmol., No. 338; accepted by Dernburg, 49; Jourdain, 86; Voigt, 236; we find the combination "pignori pepigisset," Gaius, IV, 147; Gaius' etymology quoted above (*pugnus*) is of course purely fanciful. For the "bet" or "forfeit" idea, there is voluminous evidence of *pignus* being the common term; full citations are given in Voigt, 255, 267; a few in Bachofen, 481; Jourdain, 86; Rudorff, 194. Rudorff, Dernburg, and Jourdain, in mentioning this usage, are apparently puzzled by it, and do not understand its connection with the pledge-idea. For the "promise" idea, *pact-* and *pac-ere* (from παγ-) show one line of development; but there is another, more significant, which shows how nearly the Romans escaped developing a *wadium*-promise by precisely the same path as the Germans, — the early practice of *deposito pignore certare* (Voigt, 276; Salmasius, 489; Jourdain, 90), in which the parties placed with the sequester (or private arbiter) a forfeit, which thus relieved them from furnishing personal sureties (compare the *wadium* usage), and was the reward of the winning party; and the other early institution of *legis actio per pignoris capionem* (Voigt, 250), which reminds us also of other features of the *wadium*-history. Moreover, the kinship of earnest-money and pledge again appear in the colloquial interchangeability of *arra*(*bo*) and *pignus* (Isidorus, in Bruns, 408; Salmasius, 581). Again, the close relationship, primitively, of personal and real suretyship are seen (Dernburg, 6; Jourdain, 3; Rudorff, Röm. Rechtsg., II, § 64), as in Germanic law; the personal surety is a corporal payment, and his liability is not inherited (Gaius, III, 120); there is an obscure but certain connection between *vas* (*vad-*), *præs* (*præd-*), *pleige*, and *pledge* (Salmasius, 741; Dernburg, 27; Mommsen, Z. d. Sav. Stift., VI, 71).

[2] First, though the personal action is recognized as surviving in the law as handed to us, yet it had so frequently to be mentioned by the Imperial source of law as available (C. VIII, 13, 8, A. C. 239; id. 30, 2, A. C. 240; C. IV, 10, 14, A. C. 294; C. VIII, 13, 24, A. C. 294), that the doctrine seems at that epoch still to have been questioned by some. Again, the pledgee had a choice, the pledge-right was to an extent exchangeable with the debt (Bachofen, 50; Dernburg, 20), so that the complete notion of collateralness seems hardly reached in the classical period. Finally, *pignus* is occasionally spoken of as "satisfaction," e. g. "*in vicem satisdationis*" (Ulp. in D. 46, 5, 7), — a significant phrase.

[3] Of the jurists, only three seem to have expressed themselves: (1) Gaius, in D. 13,

the more readily accept the clear signs that it was just beginning to make the pledgor pay the debt in the case of accidental loss of the *res*,[1] and that in the same way the pledgor's liability for a deficit, on the sale or forfeiture of the *res* at default, was also just superseding his primitive non-liability.[2] 2. Finally, the pledgee's

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6, 18, pr., seems to hold only to "culpa"; (2) Ulpian, in D. 20, 1, 2, says that "incommodi fortuito" is the debtor's risk; in D. 42, 5, 9, § 5, and 50, 17, 23, exacts of the creditor "non tantum dolum malum, verum culpa, quoque debet"; while in D, 13, 7, 13, § 1, he holds him for "dolus et culpa," also for "custodia," but not for "vis maior." (3) Paulus, in D. 13, 7, 14, holds him only to the care of "diligens paterfamilias"; in D. 22, 2, 6, he exonerates him from "pignoris deminutio," except in marine loans. This uncertainty, especially the fluctuation from the stricter responsibility of *custodia* (which included liability for theft), indicates a working away from some stricter standard; moreover, in D. 13, 7, 30, Paulus holds the pledgee liable for "vis major" in a pledge seized on execution (Germanic *nam*), though not in a voluntary pledge, — indicating precisely the Germanic order of development, i. e. later survival of the strict responsibility in the former class. In the Imperial legislation, the earliest record (IV. 24, 5, A. C. 224) declares the pledgee liable for faultless loss, unless he proves "manifestis rationibus se perdidisse," — a clear case of the primitive transition-stage found in other laws. In the later legislation there is much fluctuation, but the law still appears as trying to overcome a tradition in favor of the stricter standards of "vis maior" and "custodia"; IV, 24, 6, A. C. 225, not for "fortuito casu"; ib. 7, A. C. 241: "dolo vel culpa"; ib. 8, A. C. 246: "si nulla culpa vel segnitia," exonerated; VIII, 13, 19, A.C. 293: "vim majorem . . . præstare necesse non habet, ita dolum et culpam, sed et custodiam exhibere cogitur"; Coll. leg. Mos. et Rom. X, 2, § 2: "dolus et culpa." In the time of Justinian (Inst. III, 14, § 4) it was still necessary to say "placuit sufficere . . . exactam diligentiam," so that "fortuitus casus" did not make the pledgee liable; and this use of "sufficere," which has troubled commentators (e. g. Moyle's Justinian, *ad loc.*), seems naturally explainable as directed towards the final remnant of the old tradition of strict responsibility. For the place of *custodia* as intermediate between *culpa* and *vis maior*, see Biermann's article. Wächter throws little light on the subject. Dernburg (151) inverts the real order of development.

[1] The earliest Imperial pronouncement finds the law in the later-middle Germanic stage, i. e. the pledgor liable for the debt unless the contrary is agreed: C. IV, 24, 6, A. C. 225: "[In case of fortuitous loss, the pledgee] nec a petitione debiti submovetur, nisi inter contrahentes placuerit ut amissio pignorum liberet debitorem." Later passages show the final stage by omitting this qualification; IV, 24, 9, A. C. 293: " . . . pignoribus debitori pereuntibus, personalem actionem debiti reposcendi causa integram te habere"; VIII, 13, 25, A. C. 294: "servo qui fuerat pignori obligatus defuncto, debiti permanet integra causa"; VIII, 35, 3, A. C. 326: "Creditores enim, re amissa, jubemus recuperare quod dederunt." As late as Justinian's time it was deemed worth while to repeat this; Inst. III, 14, 4: "[In case of fortuitous loss, the pledgee is harmless,] nec impediri creditum petere." The necessity of proclaiming this so many times is good evidence of the persistence of a tradition to the contrary. The preceding stage of the law is almost certainly indicated by the passage of Pomponius (A. C. 150 *circa*), in D. 13, 7, 6, where he thinks that the pledgee must sell the *res*, provided the pledgor gives him a sufficient bond for the deficit, "invitum enim creditorem cogi vendere satis inhumanum est," i. e. by implication, he has nothing else than the *res* to look to for payment.

[2] In Pomponius' time the law was just emerging from the middle stage, i. e. in which an express agreement was needed to make the pledgor liable; Paulus, in D. 20,

duty to restore the surplus, though recognized in classical times by all, bears the marks of having been preceded by a contrary rule.[1]

B. We may now notice the marks of the process of curing the pledgee's defect of title. The Roman law does not sharply mark off that element of complete title which was furnished in Germanic law by the *auflassung* or *resignatio;* so that we are not able *a priori* to determine the method which would have to be chosen to supply the defect.[2] But we do know that the pledgee lacked full ownership, i. e. *dominium,* and we are prepared to find him endeavoring to obtain means of curing the defect of title. The history of his efforts seems substantially identical in features with the Germanic law.

*a'*. First, we find him cutting off the pledgor's right, and obtaining a complete right of disposition, by a process of repeated summons similar to that of Germanic law, and doubtless resting on the same theory.[3]

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5, 9, § 1 : "Pomponius autem in libro secundo ita scripsit : 'quod in pignoribus dandis adici solet [i. e. a special clause inserted], ut quo minus pignus venisset [i. e. brought at a sale] reliquum debitor redderet, supervacuum est, quia ipso jure ita se res habet, etiam non adiecto eo'"; and Scævola, in D. 46, 1, 63, puts a problem in which such an agreement appears. Gaius, too, in D. 12, 1, 28, finds it necessary to affirm that "creditor qui non idoneum pignus accepit non amittit exactionem ei debiti quantitatis in quam pignus non sufficit." Moreover, the assertion of Modestinus (D. 2, 14, 3), "Postquam pignus vero debitori reddatur, si pecunia soluta non fuerit, debitum peti posse dubium non est, nisi specialiter contrarium actum esse probetur," could hardly have been made except in a community in which the idea of the independent survival of the debt was just becoming familiar. But it still remained necessary, in the third century, to get three Imperial pronouncements before the matter ceased to be questioned; C. VIII, 27, 3, A. C. 223 : "Hypothecis vel pignoribus a creditore venumdatis, in id quod deest adversus reum vel fidejussorem actio competit"; ib. 9, A. C. 287 : "[After a sale,] quod si quid deerit, non prohibemini etiam cetera bona jure conventionis consequi"; C. IV. 10, 10, A. C. 294 : "Adversus debitorem, electis pignoribus, personalis actio non tollitur, sed eo quod de pretio servari potuit in debitum computato, de residuo manet integra."

[1] The phrase "si nihil specialiter convenit, . . . de superfluo competit actio" (C. VIII, 28, 20, A. C. 294), seems to imply that at that date a clause to the contrary was still valid; while Justinian's comprehensive law of A. C. 530 (VIII, 33, 3) makes no such qualification, i. e. the pure collateral-security idea will not allow such an agreement to stand. The express assertions of Paulus (Rec. Sent. II, 13), Ulpian (D. 13, 7, 24, § 2), and Papinian (D. 13, 7, 42) seem also to imply a necessity for removing a doubt; so also C. VIII, 28, 5, A. C. 294.

[2] It is to be noted, however, that the pledgor who fails to pay after cut off proceedings (Scævola, D. 44, 3, 14, 5; Ulpian, D. 13, 7, 4), as well as the pledgor who inserts a forfeiture clause (C. VIII, 35, 1), is said *cessare*, i. e. to abandon, — the same idea as in *resignatio, auflassung.*

[3] Paulus, Rec. Sent., II, 5, 1 : "ter ante denuntiare debitori suo debet, ut pignas luat, ne a se distrahatur"; the *ter* appears also in the mention by Ulpian, D. 13, 7, 4; while

*a''*. Next, we find the same purpose attained, as in Germanic law, by an express clause in the contract. But while in Germanic law there was no classification of the clauses, and they covered indiscriminately an appropriation by the pledgee or a sale by him or both, in Roman law the two types became distinct. (1) The *lex commissoria*, or forfeiture-clause, we know little about, except from the later mention of its prohibition.[1] (2) The *pactum venditionis, lex venditionis*, or sale-clause, is frequently mentioned as the only way by which the pledgee can obtain the power of disposition other than by the formal *denuntiatio*.[2]

It is to be noted that both the *denuntiatio* and the *lex* or *pactum* are almost invariably referred to as "allowing" (*licere*) the pledgee to do what he otherwise could not do, i. e. are aiding and curing his defect of power, and thus, as in Germanic law, the process is in no way related to the later compulsory (*debere*) sale for the pledgor's protection.

*a'''*. Abuse of this *lex* or *pactum*. The abuse of these clauses for the purpose of evading the duty of returning the surplus was soon resorted to; and the Imperial aid was invoked to prevent it.

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in Paulus, Rec. Sent., II, 13, 5 (dealing with the *fiducia* form), and in C. VIII, 27, 9, A. C. 287, *sollemniter* is used instead; the process evidently being a formal summons kindred in nature to the Germanic one. The *proscribere* of D. 47, 10, 15, § 32, is perhaps the same process.

This *denuntiatio* is often mentioned by the Emperors as the essential for obtaining a power of disposition: e. g. C. VIII, 13, 10, A. C. 290; C. V, 37, 18, A. C. 293; C. VIII, 27, 9, A. C. 287. Moreover, its droitural effect is seen in the fact (Ulpian, *semble* D. 13, 7, 4; Paulus, R. S., II, 13, 5) that the sale was lawful, after *denuntiatio*, even though the contract forbade a sale; though C. VIII, 27, 7, A. C. 238, seems *contra*.

[1] The clause in ordinary sales was: "Si ad diem pecunia soluta non sit, fundus inemptus sit"; thus it would apparently run for pledges: "Si, etc., fundus creditori sit," or (C. VIII, 35, 1) "nisi intra certum tempus pecuniam debitor solveret, fundum cessurum se creditori."

[2] It is referred to by Labeo (D. 20, 1, 35), Ulpian (D. 13, 7, 4), Gaius (II, 64), and C. VIII, 27, 8, A. C. 239, apparently as a common thing, and in C. IV, 24, 4, A. C. 223, it is expressly termed "pactum vulgare." It clearly appears to have had precisely the same purpose as the Germanic *auflassung*-clause, i. e. to cure a defect of title; e. g. Ulpian, in D. 13, 7, 4: "Si convenit de distrahendo pignore . . ., non tantum venditio valet, verum incipit emptor dominium rei habere"; Pomponius, ib. 8, § 4: "De vendendo pignore in rem pactio concipienda est, ut omnes contineantur"; moreover, in C. VIII, 27, 7, A. C. 238, the pledgor is told that, if he has any charge of fraud against the creditor, it is a personal claim only, and the buyer's title cannot be disturbed.

That this right of sale became implied apart from express authority is asserted by Ulpian (D. 13, 7, 4); yet Paulus (R. S. II, 5, 1) looks the other way. The clause at any rate continued to be usual.

In the third century, and within a year of each other, both *lex commissoria*[1] and *lex venditionis*[2] were declared not to prevent the pledgor from claiming a restoration of the surplus. The efforts to abuse the *lex commissoria* seem, however, to have continued,[3] and Constantine was obliged, in the next century, to prohibit its use entirely;[4] and the compulsory sale thus introduced is found systematically arranged for in the legislation of Justinian.[5]

Thus, in Roman as in Germanic law, the development of pledge-law appears to include two main and interacting processes, (A) the progress from the forfeit-idea to that of collateral security, and (B) the expedients made necessary to cure the pledgee's defect of title; the latter being in the course of time employed to evade the final requirements of the former.[6]

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[1] A. C. 222, C. VIII, 35, 1: "Qui pactus est, nisi intra certum tempus pecuniam quam mutuam accepit solveret, cessurum se [sc. quidquid] creditoribus, hypothecæ venditionem non contraxit [i. e. the creditor has not substituted a sale to himself instead of the pledge], sed id comprehendit quod jure suo creditor in adipiscendo pignore habiturus erat [i. e. he has merely got what as pledgee he would in any case have]. Communi itaque jure, creditor hypothecam vendere debet [i. e. and account for the proceeds]."

[2] A. C. 223, C. IV, 24, 4: "Pactum vulgare, quod proposuistis, ut si intra certum temporis pecunia soluta non fuisset, prædia pignori vel hypothecæ data vendere liceret, non adimit debitori adversus creditorem pignoraticiam actionem [i. e. for the surplus]."

[3] Paulus, in D. 13, 7, 20, § 3: "Interdum soluta sit pecunia, tamen pigneraticia actio [for the surplus] inhibenda est, veluti si creditor pignus suum emit a debitore." Compare also Marcian, in D. 20, 1, 16, § 9, and Marcellus, D. 13, 7, 34, Papinian, Fragm. Vat. 9, taking practically opposite views as to whether a pledgee could *buy* the *res* from the pledgor. By comparing these three with the earlier opinion of Pomponius (D. 13, 7, 6) that the pledgee not merely *may* sell, but *must* sell, provided the pledgor gives a bond (*cautela*) for any deficit of proceeds, we may clearly infer that in the preceding century an opinion had been growing towards compelling the pledgee to sell and account for the surplus, and that a clause of purchase by the pledgee was being used to evade that duty of restoration.

[4] C. VIII, 34, 3: "Quoniam inter alias captiones præcipue commissoriæ legis crescit asperitas, placet infirmari eam et in posterum omnem eius memoriam aboleri."

[5] C. VIII, 33, 3, A. C. 530, with rules not unlike those of our own law of to-day. The contrast between the old sale and this new kind is brought out in the passage *supra* of Pomponius, where he says that though the old and customary clause reads "licere," yet nevertheless "cogendus es vendere."

[6] The forfeit-idea, and the analogy of its development in other laws, seem thus to supply a simple solution for a topic that has long vexed students of Roman law. Apropos of this problem, a passage of M. Jourdain (561) is worth quoting: "Si la *lex commissoria* soulève des questions d'un intérêt incontestable, qui appelaient l'attention des jurisconsultes, philosophes, et praticiens, il faut reconnaître que ceux-ci ont répondu à l'appel avec empressement. Romanistes, civilistes, canonistes, sont entrés en lice. . . . Tous s'y soient donnés rendez-vous comme en un champ clos, les uns pour fournir simplement quelques passes plus ou moins brillantes, les autres

II. Using, as before, the English word "hypothec" to signify merely the retention of the *res* by the pledgor, we may now proceed to ascertain the place of this species of transaction in Roman pledge-law.

1. *a.* First, the generic word is the same, and the distinction is expressed in classical times merely by a different verb.[1]

*b.* The pledge with pledgor's possession was in existence as far back as we find *pignus* at all.[2]

*c.* Its character seems to have been simply that of a postponed pledge.[3]

*d.* The problems about surplus and deficit, and the clauses of forfeiture, etc., seem to have occurred equally for the hypothec.[4]

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pour combattre à l'outrance. Il est résulté de là une littérature juridique extrêmement abondante, — plus variée qu'on ne pourrait le croire en pareil sujet, et (honni soit qui mal y pense!) quelquefois divertissante."

[1] The authorities for this have already been given. The commonest early term was *opponere*, as distinguished from *deponere*, coupled with *pignus*. Later, the verb *obligare* was employed, and *bona pignori specialiter aut generaliter obligare* expressed the two kinds of hypothec, — general (*omnia bona præsentia et futura*), and specific: Salmasius, XIII, XIV; Voigt, 240; e. g. C. VIII, 16, 1 and 4; 17, 4 and 6; 27, 9; D. 20, 4, 2. For the public-land leases (*prædiatura*), the term was *subdare* or *subsignare:* Bruns, 398, 146; Dernburg, 30, 33, 39. In the post-Justinianean Latin of the Germanic invaders *obligare* was the common term (e. g. Köhler, 279), and in the law-Latin of mediæval South France *obligation* means hypothec.

[2] The modern investigators are practically at one on this point: Voigt, 245 (it goes back "to the earliest times of Roman antiquity"); Cuq, 634; Dernburg, 30, 67; Bachofen, 631, 7; Jourdain, 57, 90, 166; Rudorff, 201; though some of them do not put it so broadly, and merely concede that the thing existed long before the Greek name was applied to it. The earliest clear record seems to be that in Cato's Re Rustica, c. 146. The forms of action which successfully came to protect the pledgee were the Salvian interdict (for goods in a lessee's hands, pledged for rent, etc.), the Servian action (for such goods when wrongfully transferred to a third person), and the quasi-Servian (for all others): Dernburg, 51; Bachofen, 27; Jourdain, 97; Voigt, 263 (who puts the date of the first and the second as under Augustus, and of the third as under Trajan). For the later application of the Greek name *hypotheca*, see *post.*

[3] "L'entrée en possession est remise à une époque ultérieure, au jour de l'échéance si le créancier n'est pas payé": Cuq, 684; it was "till the default in the obligation in question to remain in the debtor's hands, . . . the pledgee having an expectancy of possession"; Voigt, 252. The early formula in Cato, *supra*, shows this: "Donicum solutum erit, . . . pigneri sunto." In short, the keeping custody *precario* of a *pignus* (D. 13, 7, 35, § 1; 43, 26, 6, § 4) was the hypothec-form. There seems to have been, therefore, a documentary clause specifying this: "Creditores qui, non reddita sibi pecunia, *conventionis legem ingressi possessionem* exercent, vim quidem facere non videntur": C. VIII, 14, 3.

[4] See the passages *ante*, where the two forms of *pignus* are indifferently the subject. For the debtor's-possession form, strong evidence is furnished by the Servian action, which originally (Bachofen, 29 ff.) was *in rem* and got title, not merely possession; this would leave no chance for the pledgor to recover the surplus. Again, the Cato passage

*e.* The pledgee obtained a title good against third persons.[1]

*f.* A second hypothec is already allowable in the stage when the law first reaches us; but there are indications of an earlier stage when, as in other primitive laws, it was not allowable.[2]

2. As in Germanic law, the peculiar application of the pledgor-possession pledge primitively was to contingent liabilities;[3] i. e. liabilities as to which there was as yet no default and nothing (e. g. a loan) for which the creditor could demand a present counter-use; thus the Heusler theory is here again confirmed by the presence of this peculiar feature, which we have found in so many of the primitive systems.

III. The Sale-for-Repurchase form is represented in Roman law by the *fiducia.* This was a transfer of title to the creditor by mancipation, or by *in jure cessio,* on the terms that the creditor should restore it on payment of the debt. The German jurists will probably never agree as to the nature of the debtor's right to restoration, — whether it was a contractual or a real right, and whether it was of civil or of prætorian origin.[4] The natural view

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is clear: "Si quid deportaverit [de fundo], domini esto," i. e. forfeited. Moreover, the *res uxoriæ* hypothec was *æstimata,* as in Greece: Fragm. Vat. 94–121; see *ante,* p. 20, and X. 404, for the significance of this.

[1] This seems to be conceded by all. It is noticeable that in the earliest time we have this prohibition against transfer expressed in the contract; Cato, *ubi supra:* "Ne quid eorum de fundo deportato."

[2] Thus, Paulus (R. S. II, 13, 3): "Debitor . . . aliis [sc. than the creditor], si velit vendere, potest ita, ut ex pretio ejusdem pecuniam offerat creditòri atque, remancipatam sibi, rem emptori præstet"; i. e. the very process which we have seen in other primitive systems to be the accompaniment and mark of the notion that the pledge-title is exclusive of any others; and the transaction described ib. 8 looks in the same direction. For other instances of the evident naturalness of this notion that the second creditor should pay off the first, see Jourdain, 465–479.

[3] The three chief types were (1) the landlord's hypothec against future default of rent of farm (rural) or house (city); (2) the State's claim for the rent of public land leased (*prædiatura*); (3) the wife's family's claim for restoration of *dos* on future divorce or death. The first is the subject of one of the earliest recorded instances; Cato, De Re Rustica, c. 146: "Domicum solutum erit aut ita satis datum erit, quæ in fundo illata erunt, pigneri sunto." The clearest proof that primitively this was the first situation in which the hypothec was employed is seen in the fact that the earliest remedies (the Salvian interdict and the Servian action) covered this situation only (see *ante,* p. 30), and that it was worked out through an implied (*tacita*) contract (D. 2, 14, 4). The second type above was also one of the earliest recorded kind. Finally, these three types are apparently the first cases in which the law raised an implied hypothec without express contract, — another parallel (except for the second) with other systems. For the Cato passages and similar ones, see Voigt, 253; Puchta, § 193; Bachofen, 7; Dernburg, 65, 295. For the *prædiatura* passages, see Dernburg, 33 ff.; Jourdain, 57.

[4] Compare Degenkolb, Geib, and Heck, *ubi cit.* Gény, Etude sur la Fiducie (1885), and Oertmann, Die Fiducia, Sav. Stift. (1890), have not been accessible to the writer.

would seem to be that the transferee, like our mortgagee, obtained ("uti lingua nuncupassit") a conditional title; i. e. until default he could not transfer a good title, and on payment at maturity the debtor's claim for restoration was real, not merely personal.[1] There are also hints, though not proofs, that it was by the Romans put to the same uses as by the Germans, and that its history was similar.[2]

A difficulty to be met, however, is, Was the *fiducia* still in classical times a common form of pledge? and if it was, what room was there for the *hypotheca*, and why is *hypotheca* the only term other than *pignus* used in Digest and Code? The answer to this must be that the *fiducia*-form did not die out, that it lasted down to and beyond Justinian's time, and that it is not mentioned in Justinian's compilations simply because Tribonian and his Greek assistants, by a systematic use of the erasing pen, substituted their own word *hypotheca* for the classical term *fiducia* wherever it occurred in the passages they collated.[3]

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[1] As evidence of this, the sale of a *fiducia* apparently needed the formal process of *denuntiatio* as much as the *pignus* (Paulus, R. S. II, 13, 6); and we several times hear of a *fiducia*-sale not being valid, *fiducia* here being coupled with *pignus* (ib. 5; Id., I, 9, 30); moreover, the *fiducia*-formula found some years ago in Spain contains the power-of-sale clause (Bruns, 251; Degenkolb, *loc. cit.*), which would be meaningless if the power otherwise existed.

[2] Its original use seems to have been to get the *res* into the hand of a friend, from whom it could be later reclaimed (*fiducia cum amico contracta*, Gaius, II, § 60; Boethius, in Bruns, 400). Then pledgees found it useful; and that they used it, as in Germany, to evade the surplus-restoration is indicated by the fact that Paulus (R. S. II, 4; II, 13) expressly mentions the *fiducia*-pledgee's duty to restore, but not the *pignus*-pledgee's duty, — the inference being that the latter was by then undisputed, the former not; and the Spanish formula has a clause allowing the *fiducia*-pledgee to sell for a nominal sum, — indicating a further effort to evade the duty of surplus-restoration. By the end of the classical period the *fiducia* seems to have been brought under all the rules of pledge, so far as they prevented the pledgee from getting any special benefit from using that form (just as our conditional-sale form of mortgage is to-day); and hence we find Gaius (II, 60) speaking of *fiducia* as governed by the rules of pledge ("jure pignoris"), and the phrase "pignus vel fiducia," as including the two typical forms, is common. It was this assimilation of *fiducia* to the rules of pledge that furnished the invading Lombards with *fiduciare*, etc., as their common phrase for the pledge of land; just as barbarians invading England in the 1800's would have found the conditional-sale used as the common form, and yet in effect treated as a pledge only.

[3] The argument for this radical proposition involves two steps: *a*. That legally and practically the *fiducia*-transaction and the *hypotheca*-transaction were interchangeable, so that a legal proposition would remain valid after the substitution of terms; *b*. That, this being so, the verbal usage of the surviving sources is explainable only on this hypothesis of a textual substitution.

*a*. (1) It has just been pointed out that legally the *fiducia* was governed in classical times by the rules of *pignus*. Now, furthermore, the *fiducia*, being peculiarly appro-

IV. Lack of space forbids any examination here into the development of the *vifgage* principle in Roman law, — the form in which

priate for immovables (*res mancipi* at least), had come to be in practice employed for land by leasing it back (*precario* or *conductione*) to the pledgor (Gaius, II, 60) precisely as with our own mortgage; so that Justinian's Greek lawyers found in *fiducia* a transaction precisely like their own ὑποθήκη of later times, i. e. (in the phrase of the Institutes) "proprie" a thing kept by the pledgor, "maxime" if not a movable. It was thus perfectly possible for them to use either *hypotheca* or *fiducia* of the transaction.

(2) The chief objection to supposing that the *fiducia* survived throughout classical times has been the necessity for *mancipatio* in its creation; as *mancipatio* was not abolished till Justinian's time (C. VII. 31, 5, A. C. 531), and as *pignus* (it was assumed) could only apply to pledgee's possession, it would be absurd (it was supposed) to believe that the Roman financial world could do any important part of its business by a system of security (on land) requiring either the cumbrous *mancipatio* or else possession by the pledgee; hence *fiducia* is almost always thought of and spoken of by modern writers as one of the antiquities of Roman law, dying out before classical times. Paulus' chapter on *fiducia* might have been enough to cast doubt on this, for Paulus lived at the end of the classical times; but when we once discard the notion that *pignus* required the pledgee's possession, and realize that it applied equally to the pledgor's possession and to realty, it is easy to understand that the needs of a developed commerce were amply met by *pignus* and *fiducia* together. Moreover, it is highly probable that the cumbrousness of actual *mancipatio* was not a feature of the *fiducia* even in classical times; for (quite apart from the opinion of some that *traditio* would suffice, Dernburg, 10) it would seem that *mancipatio* could be accomplished by the mere delivery of a document with witnesses, reciting *mancipatio* (Köhler, 81; Dernburg, 94; compare the "obligatis cautione mancipiis," in the Lex Rom. Burg., found in Cod. Hermog., Krueger & Stud. III, 244), — a process exactly analogous to the symbolic *traditio per cartam* in Germanic law, and in fact the very model of that development for the Lombards among whom it was earliest found. Thus there is no reason why we should hesitate to believe in the common use of *fiducia* in classical and later Roman periods.

*b.* Why, then, *must* there have been a substitution? (1) In all the Digest and Code passages selected by the Tribonian Commission, though the word *hypotheca* occurs (possibly) two or three thousand times, the word *fiducia* (as applied to a mortgage) is wanting; while in all the other sources of Roman legal usage which have survived to us independently of the Justinianean jurists, the words *fiducia* and *pignus* are alone used, and the word *hypotheca* is not used at all. For the first of these propositions, we have the authority of Professor Gradenwitz, of Königsberg (a chief collaborator in the exhaustive Concordance now in preparation), who has recently, with great courtesy, furnished for this article the nine citations of *fiducia's* occurrence, viz. 1, 2, 2, § 47, § 49 (*bis*); 3, 5, 30, § 6; 22, 3, 14; 38, 17, 2, § 15; 40, 12, 41, and 43; 47, 10, 32, — in none being used in the present sense; Salmasius had already asserted this and Révillout (Oblig. en droit égypt., 233) indorsed this. For the second proposition, Salmasius gives his authority, and Révillout indorses it for the since-discovered documents; and the present writer's examination of the extra-Justinianean sources confirms it. These outside sources are of two sorts: (*a*) the classical ante-Justinianean writings, chiefly Gaius, Paulus, and the Vatican Fragments (as well as the sepulchral inscriptions in Bruns, 306, 307); here the word *fiducia* occurs 33 times (*teste* Professor Gradenwitz), and the word *hypotheca* not at all (except in the Greek form); moreover, Paulus and Gaius, the chief authors, are represented also in the Digest, and use there the word *hypotheca* (Paulus, in D, 20, 3, 4; 20, 6, 11; Gaius, in D. 20, 1, 4, and 15), — a circumstance almost conclusive in itself; (*β*) the legal documents of the Lombards and Ostro-

the pledgee is required to set off or "reckon" the profits of the *res* against interest or capital, or both; it must suffice to say that

goths, who settled in Rome and Italy just before Justinian's time and learned the Latin that they found there, — these also not using *hypotheca*, but using *fiducia* and *fiduciare* freely, almost exclusively (Dernburg, 94; numerous quotations in Köhler, Pfandr. Forsch. 80–86, ranging from the 500's to the 800's; also in Ducange, s. v., and Val de Lièvre, Launegild, 114, note 1, down to the 1100's), a circumstance equally strong. (2) The peculiar phrase, *pignus vel hypotheca* (or *p. sive h.*, or *p. h.-ve*, or *p. et h.*), used throughout the Digest and the Code to cover all kinds of pledge-transactions, is in these extra-Justinianean sources replaced by *pignus vel fiducia* (for the classic lawyers, see Paulus, R. S., I, 9, 8; II, 13, 4; II, 17, 15; III, 6, 16; V, 1, 1; V, 26, 4, and Consult. Jurisc. 6 § 8, quoting Paulus, II, 17, 15, — the same Paulus in the Digest saying "*p. sive hyp.*," D. 20, 6, 11; for the Lombard usage, see Köhler, 84, 86). The result of these two sets of facts, (1) and (2), is that the Blackstones and Storys of Roman law appear, in MSS. independently transmitted, as knowing only *fiducia*, while in MSS. collated and excerpted by the Tribonian Commission they know only *hypotheca* in similar contexts; and that in the former the same persons subsume all pledge-forms under *pignus vel fiducia*, but in the latter under *pignus vel hypotheca*; the inevitable inference is that in the latter there has been a simple but systematic textual substitution. The harmony of later Lombard usage with the former texts confirms to completeness their title to represent true Roman usage, and indicates the Byzantine text as a spurious one. (3) The *actio hypothecaria* was simply the Justinianean name for the *actio Serviana* (as is shown not only by Inst. IV, 67, "Item Serviana et quasi-Serviana, quæ *etiam* hypothecaria vocatur," but also by the way of using the phrase in the Digest passages, D. 10, 4, 3, § 3, "in rem actione, etiam pignoraticia serviana, *sive hypothecaria*," D. 16, 1, 13, § 1, "cum quasi-serviana, *quæ et hypothecaria vocatur*," C. VI, 43, 1, "utilem Servianam, *id est hypothecariam*," — a suspicious phraseology, which by the canons of interpolation suggests a doctoring of the text in the manner of a glossarist). Now the Servian actions were originally *vindicationes*, i. e. petitory, droitural, or *in rem*, while the *pignoraticia* originally was possessory only (Bachofen, 29 ff.), which makes it plausible that the Servian actions were those which originally supplied the *fiducia*-pledgee's remedy; and the occasional phrase "pignoraticia Serviana" indicates just the complementary relation which "pignus fiduciave" represented. (4) Certain passages, otherwise inexplicable, become on the above theory perfectly clear. To take two examples only: (*α*) Marcian is made to say (D 20, 1, 5, § 2), "Inter pignus autem et hypothecam tantum nominis sonus differt." On the ordinary theory of *pignus*, this is wholly untrue; on the simple theory that *pignus* is a generic term, it is inexplicable; but on the theory of substitution, this is a natural and accurate statement of the classical law. (*β*) In C. VIII. 27, 2, A. C. 223, of "hypothecæ vel pignori," it is said that in a certain case "precario debitor possidet"; now it is impossible to speak of a debtor holding a *hypotheca*, on the ordinary theory, "*precario*"; but, said of a *fiducia*, this is perfectly correct, as also of a *pignus* retained (D. 43, 26, 6, § 4). (5) Cicero uses ὑποθήκη twice (Jourdain, 168; Dernburg, 64), once in Atticum, II, 17, again in Familiares, XIII, 56; in the former he jokingly asks Atticus to bring him a pledge of Pompey's conduct, saying, "ὑποθήκας afferes," — showing that *he* used it in its then generic Greek sense including pledgee's possession; there is a similar example of 68 A. C. in Bruns, 220. Again, Scævola's case of the Greek epistle, in D. 20, 1, 34, uses ὑποθήκη in the same sense of pledgee's possession; and Scævola goes on to discuss the case exclusively in terms of *pignus*. Now, first, it is impossible that Scævola, living at the time of Gaius, and barely before Ulpian, Paulus, and Marcian, could have used ὑποθήκη in this sense, and that the others could immediately have used the borrowed word in another sense; and, secondly, that Scævola would have gone on to discuss the case in terms

there is no indication that the development was essentially different from that of Germanic law.[1]

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of *pignus* if there had then been in use among the classical jurists the very same word Latinized. (6) As late as Theodosius' time a Code passage (VIII, 13, 6, A. C. 439) speaks of the wife's hypothec as "jus pignoris"; while in Justinian's own decrees this is spoken of as "jus hypothecæ" (C. V, 3, 19; V, 9, 8, § 4; VI, 61, 4; VIII, 18, 12; Inst. IV, 6, 29); so too, *semble*, of the minor's hypothec on the guardian's property ("pignoris titulo," in 314 A. C., C. V, 37, 18; "hypothecis," in A. C. 531, ib. 26), — indicating that there never was any actual usage of *hypotheca* at Rome, and that only among the Constantinopolitan Greek lawyers around Justinian was it ever an accepted word. (7) Any other than the substitution-theory requires us to fix some time for *hypotheca* coming into use; now it could not first have come into use in post-classical times (i. e. after 250 A. C.), because by hypothesis the classical lawyers employ it; and it could not have come into use before then, since both Gaius and Paulus, representing the 2d and 3d centuries, in complete treatises ignore the word; it is thus left unexplained, and we find ourselves in a hopeless dilemma. (8) The chief evidence against the present thesis seems to lie in the fact that Isidorus (V. 25, 22–24, Bruns, 408) mentions in the same paragraph all three words, *pignus*, *fiducia*, and *hypotheca*. This seems to be the only recorded instance of the sort; and it is easily explainable that Isidorus, writing in the 600's, with *fiducia* used by the people about him, and *hypotheca* before him (presumably) in the Justinianean texts, could do nothing less than mention all three. A passage of this sort before the time of Justinian would have much significance; after that time it has none at all.

The hypothesis of the textual substitution of *hypotheca* for *fiducia* was first advanced by the French monk Salmasius, in his De Modo Usurarum, in 1663 (cc. XIII, XIV); the arguments employed by him, in brief form, are those of *a* (1) and *b* (1) above. Since his time no one seems to have noticed it, except Révillout (Oblig. en droit égypt., 233), who points out that the discovery of the text of Gaius and the Vatican Fragments, since Salmasius' time, have only confirmed his theory. How feasible and credible such a systematic interpolation is need not be explained to the student of Roman law.

[1] Space must be taken, however, to register a protest against the orthodox usage of the word "antichresis" as signifying a pledge in which profits and interest balance each other, i. e. in which contingent profits are (not set off against a definite interest-rate, but) treated as equivalent to interest. Though the duty of the pledgee to set off the profits first against interest, and then against principal, is frequently mentioned, there was no specific Roman word either for this transaction or for the transaction of reciprocal balancing (e. g. C. IV, 32, 17). There are, however, two passages in which the Greek word ἀντίχρησις appears; Marcian, in D. 13, 7, 33: "Si pecuniam debitor solverit, potest pigneraticia actione uti ad reciperandum ἀντίχρησιν; nam cum pignus sit, hoc verbo poterit uti"; Id. in D. 20, 1, 11, § 1: "Si ἀντίχρησις facta sit, et in fundum aut in ædes aliquis inducatur, eo usque retinet possessionem pignoris loco, donec illi pecunia solvatur, cum in usuras fructus percipiat . . . ; itaque si amiserit possessionem, solet in factum actione uti." Now χρῆσις meant in Greek a loan, and hence ἀντίχρησις was (not a reciprocal use, but) a reciprocal loan or lease; i. e. the transaction is not primarily a pledge at all; the lessee of the house or farm has merely a subsidiary lien on it for the return of his money; and the whole transaction plays practically no part in the history of pledge-law. Salmasius (618, 629) has pointed this out for Roman law; but it is worth noting because in several other systems the same type of transaction recurs. Thus, in the Chaldean documents there are a number of these reciprocal leases, distinguishable from true pledges by the circumstance that the preliminary recital of a debt is lacking (Révillout, *ubi supra*, X, 413); again, in French custom, the royal lands were leased out for a sum total in advance, which vir-

Looking, then, at the Roman law in the light of the forfeit-idea, and of the analogy of other laws, there seems to be at least nothing inconsistent with the supposition that the development was similar, and much that indicates, if it does not prove, a similarity in the main features. The true strength of the evidence seems to be this, — that if the primitive notion of *pignus* involved (as seems entirely clear) the triple bet-pledge-promise notion, and therefore conceived the pledge as a forfeit, there must have been a development, in some way or other, from that to the collateral-security idea; and as we find certain transition-marks common to Roman and to Germanic law, we may naturally believe that the progress was accomplished in much the same way. One must, to be sure, approach the field of the Romanists with the diffidence of a mere licensee, and at one's peril; but the temptation to advance a theory in the present case is extreme, and one can only apologize in the language of the genial and acute old monk who was the first to suggest the true key to the Roman development: "Scio quantum hæc a communi sententia dissideant; sed si qui nostram non probabunt, afferant meliora et contra scribant; ita melius veritas elucescet." [1]

## 10. French Law.

The development of the French law as a whole is, as may be imagined, by no means easy to trace; for though in the northern regions the direct building up on the basis of primitive Germanic ideas is clearly apparent, the southern customs are overlaid everywhere by the advanced form of the Roman law, and in early

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tually, by its interest, paid the rent for a number of years (known as *engagement;* see *post*); and the *convadium, contrepand*, of some documents (Kohler, 89, 92) seems to be the same transaction. So in Anglo-Norman law the "beneficial lease" (Pollock and Maitland, Hist. Eng. Law, 111, 121) apparently served the same purpose. The key to the situation is the economic relation of the parties; if the land-owner is in the weaker situation, the transaction will be a pledge; but if the money-possessor is in the weaker situation (e. g. if the opportunities of direct mercantile investment are less available and profitable than those of the cultivation of a rich soil), he will prefer to invest by leasing land and taking the profits in lieu of interest; thus, in an Irish case of 1804 Molloy *v.* Irwin, 1 Sch. & Lefr. 310), the land-owner advertised a lease on the terms that the lessee must lend him a sum of money. The separateness of this type of transaction must be noted, because it illustrates, like the use of the mortgage form in France and Japan (*ante*, X., 412) to evade the feudal prohibition against perpetual sales, the necessity in such matters of refusing to be misled by mere forms and of going beneath to learn the real transaction.

[1] Salmasius, 632.

modern times the original lines in the complex mass of inter-related notions are not easily to be followed. Lack of space peremptorily forbids any attempt to do so here. It must suffice to point out that the problem itself may be simply stated; for it involves necessarily three processes: (1) the tracing of the pure Germanic forfeit-idea in the northern regions down to, say, the 1400's; (2) the detection of the extent of Roman influence in the southern regions; and (3) the analysis of the resulting conditions down to the 1800's, when the distinction between the *pays de nantissement* and the other region was abolished.[1]

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[1] The acute and industrious work of Franken (1879, Franz. Pfandrecht im Mittelalter) is, it must be said, on the subject of landed security extremely unsatisfactory. The cardinal thesis which he champions is that the two types of pledge with and without pledgee's possession ("old" and "new" *Satzung*, in Germanic law) are here represented by "*engagement*" and "*obligation*" (2, 7, 98), and that the former is essentially nothing but a "usufruct" ("*niessbrauch*," "*nutzungsrecht*," 99, 140, and *passim*); and the whole problem is worked out on those lines. It is impossible here to attempt to point out the specific objections to his arguments. But leaving aside such defects of method as the practical ignoring of the radical dissimilarity of the northern and the southern customs, the beginning with the customaries of the 1400's (instead of going back to purer Germanic origins), and the placing his chief reliance on the thoroughly Romanized Bouteiller and the more or less suspicious Beaumanoir, — quite apart from these *a priori* reasons for doubting his results, one particular fact must here be pointed out as practically vitiating the main results; it is that the word "engagement," taken by the learned author as the typical word for pledgee's possession, in fact *has a different meaning*, and was not used in the sense of "pledge," if at all, until modern times, and then rarely. It is not merely that Franken, in his chapter on terminology, gives no reference (28) to any source defining it as "pledge"; it is not merely that he quotes passages in which it cannot possibly have that meaning (e. g. 103, where the singular rule would be laid down by Beaumanoir that a pledgee must give surety that he will return the pledge, or else the money-borrower will not let him take it); it is not merely these and other minor discrepancies that lead to the above conclusion; it is that the early French law dictionaries and treatises, almost without exception, define "engagement" as a bailment of land, of a sort higher than a mere lease and yet short of an ownership, the common example being the lease of the royal domain in return for a sum advanced by the lessee; and only subsidiarily do some authors speak of a pledge-meaning. E. g. Richelet, Dictionnaire; orig. ed. 1680, then 1719, 1728, etc.; s. v. Engagement: (1) "Aliénation pour un temps; [ex.] on ne peut posséder les biens du Domaine que par engagement (2) l'action d'engager; (3) attachement; (4) contrat, obligation; (5) ce qui est mêlé"; s. v. Engagiste: "Celui qui tient par engagement quelque domaine ou quelques droits du Roi ou d'autre [ex.] Un engagement des aides. Celui qui a un bail à longues années n'est qu'un engagiste." (The Latin bracketed definition of "oppigneratio," etc., is inserted by later editors.) Again, De Ferrière, Dict. de Droit et de Pratique, 1778: "Engagement: signifie [1] en général, obligation que l'on contracte verbalement ou par écrit de faire ou de donner quelque chose. [2] Il signifie aussi quelquefois une aliénation qui se fait pour un temps. Les biens de Domaine ne se possède en pleine propriété; ce ne sont que des engagemens. Les baux emphytéotiques ne sont que de simples engagemens. [3] Enfin, le terme d'engagement signifie une tradition actuelle d'un héritage

It would seem, then, that there are evidences in nearly a dozen different systems of law that the progress has been from a primitive forfeit-idea to a later collateral-security idea. In some systems only one stage of the development is represented; and in most of them the extant evidence exhibits some of the various distinctive marks of the progress much more fully than others. We are perhaps entitled, however, in such cases, to use our knowledge of one type of development, where it is fully established, to enable us to supply the gaps in another system where certain of the same distinctive marks reappear; for the law too (in the words of a French scholar) has its paleontology, and from a knowledge of the general type it may often supply certain missing details.

It is not the purpose here to make further generalizations from

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pour en jouir par le créancier jusqu'à l'actuel et parfait payement de la dette pour laquelle l'engagement a été fait, afin que les fruits de l'héritage tiennent lieu de l'intérêt de l'argent; v. antichrèse"; and s. v. Antichrèse, he tells us that it "n'est pas une vente mais un simple engagement." If one will further compare the appropriate passages in Ragueau (Dictionnaire du Droit Français, orig. ed. 1583) and Loysel (Institutions Coutumières, orig. ed. 1607), and the chapters e. g. of Beaumanoir on "Bail" and "Gage," and of Pothier on "Louage" and "Hypothèque," it will be apparent enough that "engagement" meant and was used originally and commonly just as Richelet says, "aliénation pour un temps," a long lease as distinguished from a sale; that so far as it was ever applicable to a minor form of "gage," it was as a generic word which merely included the "gage" as a species; that this use was wholly subsidiary and occasional, and in ordinary use the "engagement" was dealt with under "bail" and not under "gage"; and that "nantissement" and "gage" were the ordinary words in the Beaumanoir period (e. g. B. LXVIII, 10, Loysel, § 483) for the transaction with pledgee's possession. It is thus easy to see how Franken, by taking as the typical word a term meaning a sort of "bail," "louage," or lease, is able to assimilate the pledge to a usufruct, and also how incorrect his results would thus become as representing the real doctrines of pledge. It is much as though he had undertaken to investigate the English law of debt; and, having found that the debts of a bank to a certain class of customers were known as "deposits," had taken all the passages in which the word "deposit" occurred and expounded our theory of debt in the light of the generic term "deposit"; what he would give us would be the law of bailment, not of pledge; and his discovery of "engagement" as occasionally used to cover a kind of "gage," and the erection of a theory of "gage"-law upon this abnormal usage is as little satisfactory in its results. The authority of Franken's treatise (unfortunately uncompleted), the important bearing of the subject on the Norman mortgage, and the great usefulness of the remaining portion of his work (on movable property, the *wadium*-promise, etc.), must be the excuse for here pointing out the reasons for distrusting his analysis of the land-*gage*. It need hardly be said that our attitude towards the history of the Norman (and therefore the English) mortgage will be radically affected according as we adopt the forfeit-idea or the usufruct-idea as the key to its development; and it remains to be shown, by some more competent hand, which of these theories (that of Heusler or that of Franken) receives corroboration and illustration in English history.

these results. It may be necessary to add, however, that there is no intention of suggesting the notion that the development of the pledge-idea might *a priori* have been expected to be the same in all systems, or that for any other legal idea the form or the expedients or the progress must be or is likely to be identical among various peoples. On the contrary, the point of view, in the comparative study of legal ideas, is rather, assuming nothing beforehand, to ascertain exactly what forms and expedients were employed for the specific purpose in question, to note the likenesses and the differences, and to learn how far the differences and contrarieties — great or small, radical or superficial — are explainable by the differing conditions of national life.

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